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No. 80-965

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

TEXACO, INC.,
ROBERT BRASELTON,
ELECTRA FIELDS,
CHARLES BRASELTON,
CHESTER BRASELTON,
ROBERT E. BRASELTON,
CLIFFORD N. BRASELTON,
OSBORNE T. BRASELTON, JR.,
DAVID E. BURKHART,
JOHN P. BRASELTON,
ROSA G. BURKHART, and
D. W. MAYHEW, d/b/a Mayhew Oil and Gas Development - - - - - - Appellants

versus

LOUISE F. SHORT - - - - - - Appellee

STATE OF INDIANA - - - - - Intervenor

On Appeal from the Supreme Court of Indiana

BRIEF OF APPELLANTS

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QUESTIONS PRESENTED FOR REVIEW

This is an appeal of the decision of the Supreme Court of Indiana in *Short* v. *Texaco*, ____ Ind. ____, 406 N. E. 2d 625 (1980), holding the Dormant Mineral Interests Act (also known as the Indiana Mineral Lapse Act) Indiana Code 32-5-11-1, *et seq.*, to be constitutional under both the United States and Indiana Constitutions, where the Act provides that a mineral interest severed from the surface ownership is deemed extinguished if use of the mineral interest is not made within 20 years or a statement of claim setting forth the ownership of the mineral interest is not filed in the county recorder's office.

1. Due Process.

Does the Dormant Mineral Interests Act of the State of Indiana violate the United States Constitution as to the 14th Amendment by depriving landowners of their property without due process of law, in that non-use of a mineral right for 20 years under the Act purports to extinguish the right without any notice or hearing?

2. Just Compensation.

Does the Dormant Mineral Interests Act of the State of Indiana violate the U.S. Constitution as to Section 1 of the 14th Amendment by the taking of private property without compensation to the person from whom the property has been taken when mineral rights are extinguished after 20 years of non-use, and such extinguished rights accrue to the owner of the surface?

3. Equal Protection.

Does the Dormant Mineral Interests Act of the State of Indiana violate the U.S. Constitution as to the 14th Amendment by denying certain persons of the equal protection of the law when it provides that the owners of 10

or more mineral interests in a county who inadvertently fail to file a statement of claim must be given written notice and a chance to file their claim prior to extinguishment of their interest when similar treatment is not afforded to those having less than 10 mineral interests?

4. Impairment of Contract.

Does the Dormant Mineral Interests Act of the State of Indiana violate the U.S. Constitution as to Article 1, Section 10, by unreasonably impairing the obligations of contracts in that it purports to terminate a contract right without consent or action of the parties?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption of the case in this court. DeBeers Diamond Investment Ltd. was named a party below but a stipulation filed in the trial court shows they have no interest and are not a party before this Court. There is a companion (but not consolidated) case raising the same issues before this Court in No. 80-1018. This appeal attacks the constitutionality of the Indiana Dormant Mineral Interests Act on behalf of oil and gas interest holders. The companion case attacks the same Act on behalf of coal interest holders. The Supreme Court of Indiana made no distinction between the two interests, holding both to be vested property interests.

Reference is made to the Jurisdictional Statement for compliance with Rule 28.1 of the Rules of this Court.

TABLE OF CONTENTS

PAGE

Questions Presented ..... i– ii

1. Due Process i
2. Just Compensation i
3. Equal Protection ..... i– ii
4. Impairment of Contract ii

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities ..... iv– v

Citations to the Opinion and Judgment of the Courts Below 1– 2

Grounds of Jurisdiction 2

Constitutional Provisions 2– 3

The Indiana Statute in Question 3– 6

Statement of the Case 6– 8

Summary of the Argument 8–11

Argument 12–35

A. Introduction 12–16
B. Procedural Due Process 16–23
C. Just Compensation 24–31
D. Equal Protection 32–33
E. Impairment of Contract 33–35

Conclusion 35–37

TABLE OF AUTHORITIES

PAGE

Allen v. *Smith*, 129 U. S. 465, 9 S. Ct. 338, 32 L. Ed. 732, 51 Am. Jur. 2d 894 (Limitation of Actions §422) 30

Allied Structural Steel Company v. *Spannaus*, 438 U. S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978) 11, 33, 34–35

Andrus v. *Allard*, 444 U. S. 51, 61, 100 S. Ct. 318, 327 (1979) 26, 27

Bickel v. *Fairchild*, 410 Mich. 21, 229 N. W. 2d 704 (1980) 14

Board of Regents of State Colleges v. *Roth*, 408 U. S. 564, 569, 92 S. Ct. 2701, 2702, 33 L. Ed. 2d 548 (1972) 14

Chase Securities Corporation v. *Donaldson*, 325 U. S. 304, 65 S. Ct. 1137, 89 L. Ed. 1628 (1945) 30

Chicago & North Western Transportation Co. v. *Pedersen*, 80 Wis. 2d 566, 259 N. W. 2d 316 (1977). 13

Contos v. *Herbst*, ____ Minn. ____, 278 N. W. 2d 732 (1979) 13–14, 31

Day-Brite Lighting v. *State of Missouri*, 342 U. S. 421, 72 S. Ct. 405 (1952) 26

Fuentes v. *Shevin*, 407 U. S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) 19

Kaiser Aetna v. *United States*, 444 U. S. 164, 100 S. Ct. 383 (1979) 27, 29

Lynch v. *Household Finance Corp.*, 405 U. S. 538, 552, 92 S. Ct. 1113, 1122, 31 L. Ed. 2d 424 (1972) 20

Mackey v. *Montryn*, 443 U. S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979) 22

Matthews v. *Eldridge*, 424 U. S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) 21, 22

Memphis Light, Gas & Water Division v. *Craft*, 436 U. S. 1, 98A S. Ct. 1554, 56 L. Ed. 2d 30 (1978) ... 15, 20

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 70 S. Ct. 652, 94 L .Ed. 865 (1950) 9, 17–18, 23

PAGE

Ochoa v. *Hernandez y Morales*, 230 U. S. 139, 33 S. Ct. 1033, 57 L. Ed. 1427 (1913) 20

Ohio v. *Dollison*, 194 U. S. 447, 48 L. Ed. 1062 (1904). 32

Penn Central Transportation Company v. *New York City*, 438 U. S. 104, 98A S. Ct. 2646, 57 L. Ed. 2d 631 (1978) 27, 28, 29

Pennsylvania Coal Company v. *Mahon*, 260 U. S. 393, 415, 43 S. Ct. 158, 159, 67 L. Ed. 322 (1922) 10, 26, 27, 28, 29, 30

Short v. *Texaco*, ____ Ind. ____, 406 N. E. 2d 625 (1980) 1, 15–16, 29

Sniadach v. *Family Finance Corporation of Bayview*, 395 U. S. 337, 89A S. Ct. 1820, 23 L. Ed. 2d 349 (1969) 19, 23, 26

U. S. Railroad Retirement Board v. *Fritz*, ____ U. S. ____, 101 S. Ct. 453, 459, 66 L. Ed. 2d 368 (1980). 32–33

United States Trust Company of New York v. *New Jersey*, 431 U. S. 1, 97A S. Ct. 1505, 52 L. Ed. 2d 92 (1977) 33, 34

United States, ex rel TVA v. *Powelson*, 319 U. S. 266, 63 S. Ct. 1047, 87 L. Ed. 1390 (1943) 27

Wheelock v. *Heath*, 201 Neb. 835, 272 N. W. 2d 768 (1978) 13, 35

Wilson v. *Bishop*, 82 Ill. 2d 364, 412 N. E. 2d 522 (1980) 13, 31

Indiana Code 32-5-11-1, et seq. 2, 3–6, 24, 32

Indiana Code 2-6-1.5-5 23

Indiana Code 32-5-7-3 ..... 15, 31

United States Constitution, 14th Amendment, Section 1 ..... 2–3, 19, 21, 24

United States Constitution, Article 1, Section 10, Clause 1 3

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v.

LOUISE F. SHORT - - - - - - - - *Appellee*

STATE OF INDIANA - - - - - - *Intervenor*

ON APPEAL FROM THE SUPREME COURT OF INDIANA

BRIEF OF APPELLANTS

CITATIONS TO THE OPINION AND JUDGMENT DELIVERED IN THE COURTS BELOW

The opinion of the Supreme Court of Indiana, the Court below is cited as:

Short v. *Texaco*, ____ Ind. ____, 406 N. E. 2d 625 (1980).

The opinion was entered June 23, 1980, and is set forth in full at Page A-1 of the Appendix to the Jurisdictional Statement.

The Judgment of the trial court which was reversed by the Supreme Court of Indiana was entered September 18, 1978. It is set forth in full at Page A-14 of the Appendix to the Jurisdictional Statement. There is no other citation to the judgment.

GROUNDS OF JURISDICTION

This is a direct appeal from the decision of the Supreme Court of Indiana (the highest court of the State) holding the Indiana Dormant Mineral Interests Act (Indiana Code 32-5-11-1, *et seq.*) to be constitutional under the U.S. Constitution. Jurisdiction of this Court is founded on 28 U.S.C. §1257(2). Judgment was entered by the Gibson Circuit Court on September 18, 1978. The Indiana Supreme Court rendered its decision on June 23, 1980. A timely petition for rehearing was filed and it was denied by the Supreme Court of Indiana on September 24, 1980. Notice of Appeal to the Supreme Court of the United States was filed with the Supreme Court of Indiana on November 17, 1980. (Jurisdictional Statement, Appendix, Page A-28). This Court noted probable jurisdiction on March 23, 1981.

CONSTITUTIONAL PROVISIONS

Constitution of the United States of America:

> 14th Amendment, Section 1: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, Section 10, Clause 1: No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

THE INDIANA STATUTE IN QUESTION

In 1971 the State of Indiana enacted the Indiana Dormant Mineral Interests Act (also known as the Indiana Mineral Lapse Act) (more properly known as the Indiana Mineral Interest Extinguishment Act) (hereafter sometimes referred to as the "Act"). The full text of the Act is as follows:

I. C. 32, Section 5
Chapter 11—Lapse of Mineral Interest

Section 1. Any interest in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section five hereof, and the ownership shall revert to the then owner of the interest out of which it was carved.

Section 2. A mineral interest shall be taken to mean the interest which is created by an instrument transferring, either by grant, assignment, or reservation, or otherwise an interest, of any kind, in coal, oil and gas, and other minerals.

Section 3. A mineral interest shall be deemed to be used when there are any minerals produced there-

under or when operations are being conducted thereon for injection, withdrawal, storage or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner thereof for the purpose of delaying or enjoying the use or exercise of such rights or when any such use is being carried out on any tract with which such mineral interest may be unitized or pooled for production purposes, or when, in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of such mineral interests, or when taxes are paid on such mineral interest by the owner thereof. Any use pursuant to or authorized by the instrument creating such mineral interest shall be effective to continue in force all rights granted by such instrument.

Section 4. The statement of claim provided in section one above shall be filed by the owner of the mineral interest prior to the end of the 20 year period set forth in section two (one) or within two years after the effective date (September 2, 1971) of this act, whichever is later, and shall contain the name and address of the owner of such interest, and description of the land, on or under which such mineral interest is located. Such statement of claim shall be filed in the office of the Recorder of Deeds in the county in which such land is located. Upon the filing of the statement of claim within the time provided, it shall be deemed that such mineral interest was being used on the date the statement of claim was filed.

Section 5. Failure to file a statement of claim within the time provided in section 4 shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

(1) was at the time of the expiration of the period provided in section four, the owner of 10 or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

(2) made diligent effort to preserve all of such interests as were not being used, and did within a period of 10 years prior to the expiration of the period provided in section 4 preserve other mineral interests, in said county, by the filing of statements of claim as herein required, and;

(3) failed to preserve such interest through inadvertence, and;

(4) filed the statement of claim herein required, within 60 days after publication of notice as provided in section seven herein, if such notice is published, and if no such notice is published, within 60 days after receiving actual knowledge that such mineral interest had lapsed.

Section 6. Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, may give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located, and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within 10 days after such publication a copy of such notice to the owner of such mineral interest. The notice shall state the name of the owner of such mineral interest, as shown of record, a description of the land, and the name of the person giving such notice. If a copy of such notice, together with an affidavit of service thereof, shall be promptly filed in the office of the Recorder of Deeds in the county wherein such land is located, the record thereof shall be prima facie evidence, in any legal proceedings, that such notice was given.

Section 7. Upon the filing of the statement of claim, provided for in section 4 of this chapter or the proof of service of notice as provided in section seven (six) of this chapter in the Recorder's office for the

county where such interest is located, the Recorder shall record the same in a book to be kept for that purpose, which shall be known as the "Dormant Mineral Interest Record" and shall indicate by marginal notation on the instrument creating the original mineral interest the filing of the statement of claim or affidavit of publication and service of notice.

Section 8. The provisions of this chapter may not be waived at any time prior to the expiration of the 20 year period provided in section 1.

STATEMENT OF THE CASE

The facts of this case are not relevant to a determination of the sole issue before this Court; namely, the constitutionality of the Indiana Dormant Mineral Interests Act. The issue of constitutionality was raised by affirmative answer at the trial court level and maintained throughout the proceeding.

The Appellee Short is the record owner of a 132 acre tract of land in Gibson County, State of Indiana, which she acquired by deed in 1974 (J.A. 21). Such deed specifically provided that it was subject to certain mineral deeds covering "oil, gas and other minerals." (J.A. 22) Such mineral deeds conveying all oil, gas and other minerals were created in 1942 and 1944 (J.A. 19-21) and were duly and promptly recorded in the Gibson County Recorder's office. The Appellants (with the exception of D. W. Mayhew d/b/a Mayhew Oil and Gas Development) are the successors in interest to such mineral interests. (J.A. 23) The Appellant, D. W. Mayhew d/b/a Mayhew Oil and Gas Development, is the lessee of oil and gas leases taken from the mineral interest holders in 1976 and 1977. (J.A. 24)

Thus, the record shows that Appellee is the surface owner of the 132 acre tract of land and except for the Indiana Dormant Mineral Interests Act, the Appellants are the mineral interest owners of such tract.

Thereafter, on April 28, 1977, the Appellee surface owner gave notice to Appellant mineral interest holders by publication in the Star Echo, a newspaper published at Owensville, Indiana, of a lapse of mineral interest. (J.A. 25). On May 6, 1977, the surface owner sent Notice of Lapse of Mineral Interest by United States Mail to the Appellants (except for the oil and gas lessee). (J.A. 26) Within 60 days (on June 17, 1977) Appellants filed statements of claim of mineral interest in the office of the Recorder of Gibson County, Indiana. (J.A. 26).

At no time were any of the Appellants the owners of 10 or more mineral interests in the County.

Thereafter, Appellee surface owner filed this action for declaratory judgment which was commenced in the Gibson Circuit Court of Gibson County, Indiana in 1977, against the Appellant mineral interest owners praying for a declaration that the rights of the mineral interest owners had lapsed and were extinguished by reason of the Indiana Dormant Mineral Interests Act, adopted in 1971. The complaint alleged that the mineral interests of the Appellants Texaco, et al., were not "used" within the meaning of the Indiana Dormant Mineral Interests Act for more than 20 years and no statement of claim was made under the Act. (J.A. 3)

Defendants filed answer raising the federal and state constitutionality issue (J.A. 11).

A stipulation of the parties agreed that Appellee Short's predecessor in title had granted oil and gas mineral deeds to Appellants' predecessors in title in 1942 and 1944 and

that Appellants Texaco, et al., had not used the mineral interests for 20 years and had not filed a statement of claim under the Act within two years following the enactment of the Act. (J.A. 18) Such stipulation did provide that Appellants did file statements of claim within 60 days of receiving Notice of Lapse of Mineral Interest. However, since none of the Appellants had 10 or more interests in the County, such filing would not prevent the extinguishment of their rights under the Act.

The judgment of the trial court held the Act to be unconstitutional under both the Indiana and U. S. Constitutions. (Jurisdictional Statement, Appendix B)

Upon appeal the Supreme Court of Indiana reversed holding the Act constitutional under both the Federal and State Constitutions. The opinion of the Supreme Court of Indiana is cited as 406 N.E. 2d 625. The opinion is set forth in full at Appendix A to the Jurisdictional Statement.

SUMMARY OF THE ARGUMENT

In 1971 the State of Indiana passed the Indiana Dormant Mineral Interests Act with the intent to reunite severed mineral interests with the ownership of the surface in cases where such mineral interests had not been used for 20 years or a statement of claim filed within that time (or within two years of the Act if the 20 year non-use has already expired). No notice was required to be given to the severed mineral interest owner before the Act extinguished his right, except for owners of 10 or more interests, in which event they were given a 60 day notice and an opportunity to file their statement of claim. Only in the event they failed to do so would their rights be extinguished.

It is Appellants' belief that the Indiana Act is unconstitutional.

Indiana has held mineral interests to be fee simple interests and vested property rights separate and distinct from the surface ownership. Such rights, in the language of the Indiana Supreme Court "are entitled beyond question to the firmest protection of the Constitution."

It is in the context of a vested property right that such Act violates four provisions of the United States Constitution.

1. *The Act Violates Procedural Due Process.* The Act extinguishes the mineral interests of the property owner without notice or opportunity for hearing as required by *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) and a whole series of cases thereafter. The Constitution requires that before a complete taking of a property right occurs that prior notice of such proposed taking must be given and an opportunity to be heard afforded. The true pernicious nature of the Act is found mainly in its retroactive effect. The mineral interest holders acquired their interests in 1942 and 1944 long prior to the passage of the Act. The Act comes along in 1971 and by 1973, their mineral rights had been extinguished though they had done nothing illegal and were not interfering with the rights of others. They could have saved their rights under the Act by filing a statement of claim within the two year period following the adoption of the Act had they known of the new requirement. The mineral interest holders were not lost, had not abandoned their interests and all responded to defend themselves once notice was given to them.

The procedural due process provisions were complied with as to the owners of 10 or more interests who were

afforded notice prior to the extinguishment of their interests. It violated due process in not affording similar rights to all mineral interest holders.

2. *The Act Violates the Just Compensation Provisions of the 5th and 14th Amendments.*

The Act extinguishes mineral interests retroactively for non-use within the 20 year period prior to the Act and two years following the Act. Such extinguished mineral interest is then reunited with the surface ownership. The net effect of the Act is to take fee simple ownership from the mineral interest holder and give it to the surface owner. Such taking and giving was made without notice and without compensation of any kind.

Assuming that there was a valid public purpose to be served by such taking, does that permit the taking without just compensation? The 1922 decision of *Pennsylvania Coal Company* v. *Mahon*, 260 U. S. 393, 43 S. Ct. 158, 159, 67 L. Ed. 322 (1922) holds that even though there is a valid public purpose, property can only be taken by payment of just compensation. In the years since *Mahon, id.*, the Court has refined what constitutes a "taking" but it is clear that where the entire bundle of rights comprising property ownership has been extinguished as a result of state action, that a taking has accrued requiring just compensation. That is particularly true where the property rights have been taken from one private person and given to another private person.

There is no analogy to the Marketable Title Acts, title recordation acts or statutes of limitation.

The mineral interest is a separate and distinct interest, independent of the surface ownership and of equal dignity. One is not a cloud on the title of the other. These are not

stale claims to be excised from the public record. These are titles in tandem not in collision, each of equal dignity before the law.

3. *The Act Violates the Equal Protection Clause.* The Act protects 10 or more interest holders by allowing them to record their statements of claim after having been given notice of lapse of interest, thus preventing extinguishment of their interest, whereas such right was not afforded all interest holders. Thus, only multi-interest holders are afforded procedural due process by prior notice—an invidious discrimination of a fundamental constitutional right.

4. *The Act Violates the Contract Clause by Extinguishing a Contract Right by State Action.*

The mineral interests held by Appellants are, in addition to being property rights, contract rights which under the Act are extinguished. Such rights are extinguished without notice and without compensation. Admittedly, under the police power, the states can impose reasonable restrictions and regulations on contract rights but they are precluded from completely abridging such rights, "even in the exercise of its otherwise legitimate police power." *Allied Structural Steel Company* v. *Spannaus,* 438 U. S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978). Here the entire bundle of contract rights were extinguished in violation of the Contract Clause.

THE ARGUMENT

A. Introduction.

In 1971 the State of Indiana passed an act which has been referred to as the Indiana Dormant Mineral Interests Act or the Indiana Mineral Lapse Act. The Act was adopted to remedy a perceived problem in Indiana, that of severance of the surface ownership of real estate from the ownership of oil, gas, coal or other minerals lying beneath the surface (mineral rights) and the non-use of such mineral rights by the owners thereof.

The Act attempted to remedy the problem by providing that if such mineral rights are not used for 20 years and if the owners of the mineral rights failed to record in the Recorder's office of the County where located a "statement of claim" that such mineral rights were "extinguished" and ownership thereof vested in the surface owner. Such extinguishment of rights is automatic under the Act. There is no notice required or provided, no opportunity to be heard and no compensation for the taking of such rights. The Act was adopted to achieve the state's policy of re-uniting the previously severed mineral interests with the surface ownership. (See Indiana Supreme Court Opinion. Appendix A to Jurisdictional Statement.)

The Act had an exception in the case of a mineral owner who had 10 or more mineral interests in the county. As to such owner, if he met certain requirements, his mineral rights would only "lapse" and could be "extinguished" only upon the surface owner giving him notice and the mineral owner failing to file a "statement of claim" within 60 days following such notice.

The record shows that the Appellee surface owner before filing her complaint for Declaratory Judgment gave notice of lapse of mineral interest to Appellant mineral interest owners as provided by Section 6 of the Act. All Appellants within 60 days filed their statements of claim with the County Recorder in the manner provided by Statute. However, none of the Appellant mineral interest owners held 10 or more mineral interests in the county. Thus, even though they were vigilant in protecting their mineral interests after receiving notice, the Act extinguished their mineral rights.

The practical effect of the Act is not to clear titles of old stale claims but to put clouds on all mineral titles more than 20 years old—used or unused. No oil and gas operator is going to rely upon a lease from a surface owner relying on the Act for it is impossible to tell from the record whether the mineral interest has been "used" as defined by the Statute. Further it would be impossible to tell from the record if the mineral owner owned 10 or more mineral interests to come within the exception. The net effect of the Act is that it is only by court action to quiet title or declaratory judgment, with notice to all parties as required by law that the matter can be settled. Thus, the Act is not "self-executing" as the Appellee contends.

The trial court held the Act unconstitutional only to be reversed by the Supreme Court of Indiana. Similar acts were held unconstitutional under the 14th Amendment to the U.S. Constitution in Wisconsin, *Chicago & North Western Transportation Co.* v. *Pedersen,* 80 Wis. 2d 566, 259 N. W. 2d 316 (1977); in Illinois, *Wilson* v. *Bishop,* 82 Ill. 2d 364, 412 N. E. 2d 522 (1980); in Nebraska, *Wheelock* v. *Heath,* 201 Neb. 835, 272 N. W. 2d 768 (1978); and in Minnesota, *Contos* v. *Herbst,* ____ Minn. ____, 278 N. W.

2d 732 (1979). Michigan, on the other hand, has held a similar statute constitutional. *Bickel* v. *Fairchild,* 410 Mich. 21, 229 N. W. 2d 704 (1980).

It is important to note the retroactive effect of the Act. The Act was adopted in 1971. It purported to extinguish mineral interests created before the Act and for non-use before the Act. Appellants express no opinion as to the constitutionality if the Act were prospective only or applicable to mineral interests created after the passage of the Act.

The Act is before this Court to determine whether or not it satisfies the constitutional requirements of:

A. Procedural Due Process
B. Just Compensation
C. Equal Protection
D. Impairment of Contract

Essential to a decision in this case is a determination of the "rights" of Appellants Texaco, et al.

The rights of Appellants arise out of mineral deeds granted by the then surface owner in 1942 and 1944 (J.A. 19) granting to the Appellants and their predecessors in title fee ownership of oil, gas and other minerals in and under the real estate. This Court in *Board of Regents of State Colleges* v. *Roth,* 408 U. S. 564, 569, 92 S. Ct. 2701, 2702, 33 L. Ed. 2d 548 (1972), stated:

> "Property interests are not created by the Constitution; rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

See also *Memphis Light, Gas & Water Division* v. *Craft*, 436 U. S. 1, 98A S. Ct. 1554, 56 L. Ed. 2d 30 (1978).

Following such dictates, we look to the law of Indiana for the creation of the right and the dimension thereof.

Indiana Code 32-5-7-3 provides:

> "Interests in the oil and gas in or on or under or that may be taken from beneath the surface of lands lying within this state may be created for life, for a term of years, or in fee, in such manner and to such extent as are all other interests in real estate; and title to such estates may be vested in one or more persons, by sole ownership, tenancy in common, joint tenancy, tenancy by the entireties, or in such other manner as may be now or hereinafter recognized in the law of this state. Such interests or estates shall be freely alienable, in whole or in part, in like manner as are other interests in real estate."

It is to be noted that under the Indiana law the fee ownership to oil and gas is a separate and distinct right separate and apart from but with equal dignity to the ownership of the surface. It is not a lesser right appurtenant to the surface ownership right. Such rights of subsurface ownership and surface ownership are not competing rights, neither has superiority over the other—neither is the superior right.

The Supreme Court of Indiana in its decision from which this appeal is being taken (*Short* v. *Texaco, supra*), held as a matter of Indiana law:

> "Interests or estates in oil, gas, coal and other minerals lying beneath the surface of the land are interests in real estate for our purposes here, and as such are entitled beyond question to the firmest protection of the Constitution from irrational state action.

> They are vested property interests, separate and distinct from the surface ownership. The State has no power to deprive an owner of such an interest without due process of law. They are entitled to the same protection as are fee simple titles. They are themselves of great utility and benefit to the society as a means of facilitating the development of natural resources." *Short* v. *Texaco, supra,* 406 N. E. 2d at page 627.

It is clear from the foregoing we are dealing with fee simple titles equal to but separate and distinct from the surface ownership. It is in that context the question of violation of constitutional rights must be answered.

B. Procedural Due Process. The Indiana Act Violates the 14th Amendment in That It Extinguishes a Property Right Without Notice or Opportunity for Hearing.

The Indiana Act provides that if a mineral interest is not "used" within a 20 year period the interest is extinguished unless the owner of the mineral interest files a "statement of claim" with the county recorder within the 20 year period (two years from the date of the Act, if the 20 years of non-use has already occurred). The effect of the Act is to extinguish rights solely based on non-use for 20 years regardless of whether or not the owner's whereabouts is known. Here the record shows substantially all of the mineral interest owners were known to the surface owner (as shown by the fact that notice by mail was given by the surface owner *after* the extinguishment) yet no notice was required or given *before* the extinguishment. Further, there is nothing in the record or required by the Act showing an emergency situation requiring summary action to justify the taking without notice.

The very nature of oil and gas or other hydrocarbons calls for long term use. Such hydrocarbons are produced from plants and animal material that existed millions of years ago. The formation of oil and gas takes millions of years and a happenstance of conditions: plant and animal life, water pressure, temperature, soils, porous limestone or sandstone covered by a layer of impervious rock and earth movement which traps the oil. Having taken a millennia to create, it seems a bit absurd to say that if the oil, gas or coal is not extracted within a 20 year period the mineral rights owner can have his interests extinguished by reason of such non-use. There may be numerious reasons why an owner may not develop or use such mineral interests within the period, reasons such as economics, technology and geology.

It should be further noted that one of the accepted ways of creating an interest in oil and gas or coal is by an oil and gas lease or coal lease. Such leases are of limited terms—one year for example, "and so long thereafter as oil and gas (coal) is produced from the premises". Such leases usually provide a royalty to the owner payable out of the production—such as ⅛th of all oil and gas.

The very nature of a mineral deed which is an interest in fee contemplates a different approach. There is no short term performance period. There is no royalty payable out of production. All of the payment is made at the front end and the owner of the mineral interest decides for himself when it is time to extract the minerals based on many factors. Hence the 20 year limitation is at variance with the expectations of the parties in the creation of such interests.

The leading case on the requirement of notice and opportunity for hearing is *Mullane* v. *Central Hanover Bank*

& Trust Co., 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). There, this Court dealt with the constitutionality of a New York law which required that for judicial settlement of trust accounts the trust company trustee was only required to publish notice in a newspaper of the filing of such account. No other notice was required to be given to the beneficiaries of the trust. In that case the court struck down the New York law, holding:

> "The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand." *Mullane, supra,* 339 U. S. at page 319, 70 S. Ct. at page 660.

As a basis thereof this Court said:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane, supra,* 339 U. S. at page 313, 70 S. Ct. at page 656.

It is to be noted that in the very Act in question is "notice and opportunity for hearing appropriate to the nature of the case". For those fortunate to have 10 or more mineral interests the Act provides that their interest only "lapses" and is not "extinguished". To "extinguish" such "lapsed" interests the surface owner must give notice by publication and by mail, if the address can be obtained. Only if the mineral interest owner fails to file his statement of claim within 60 days thereafter is the mineral interest extinguished. Thus, what may be appropriate notice

is already provided for in the Act but unfortunately it is limited to the affluent having 10 or more interests.

In *Sniadach* v. *Family Finance Corporation of Bayview*, 395 U. S. 337, 89A S. Ct. 1820, 23 L. Ed. 2d 349 (1969), this Court was confronted with the Wisconsin garnishee law. There a creditor, prior to judgment could cause the defendant debtor's wages to be frozen without the opportunity to be heard. This Court struck down the law holding it violated procedural due process. The Court noted that it was making no judgment about whether the law was wise—the sole question is whether there has been a taking of property without that procedural due process required by the 14th Amendment. The Court concluded its opinion by saying:

> "Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing. . . . this prejudgment garnishment procedure violates the fundamental principles of due process." *Sniadach*, id., 395 U. S. at page 342, 89A S. Ct. at page 1823.

It is submitted that the taking (read "extinguishment") of Appellants' fee mineral rights without notice and prior hearing is an obvious violation of due process.

Following the *Sniadach*, id., decision, this Court in 1972 handed down *Fuentes* v. *Shevin*, 407 U. S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). There the Florida and Pennsylvania prejudgment replevin statutes were held violative of the Due Process Clause for failure to have notice and opportunity for hearing prior to seizure of property. The Court, speaking through Mr. Justice Stewart, said:

> "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair

process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to insure abstract fair play to the individual. Its purpose more particularly, is to protect his use and possession of property from arbitrary encroachment. . . . the prohibition— . . . . against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of government interference. 407 U. S. at page 80, 92A S. Ct. at page 1994. See *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 552, 92 S. Ct. 1113, 1122, 31 L. Ed. 2d 424 (1972)."

In the *Lynch* case, id., the Court said:

"The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized."

Without the guarantee of due process as provided by our Constitution the right of private property cannot be said to exist. *Ochoa* v. *Hernandez y Morales*, 230 U. S. 139, 33 S. Ct. 1033, 57 L. Ed. 1427 (1913).

In 1978, this Court decided *Memphis Light, Gas & Water Division* v. *Craft*, 436 U. S. 1, 98A S. Ct. 1554, 56 L. Ed. 2d 30 (1978). The Memphis Light, Gas & Water Division of the City of Memphis terminated utility services of respondents without an opportunity for hearing. This Court

held that such action violated the Due Process Clause of the 14th Amendment. In doing so, it relied on *Matthews* v. *Eldridge*, 424 U. S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) to "provide a framework of analysis for determining the specific dictates of due process" in this case.

In *Matthews*, id., the Court identified three distinct factors to be considered:

(1) The private interest that will be affected by the official action;

(2) The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and,

(3) The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Under the three preceding factors:

(1) The private interest affected is the complete extinguishment of a property right and the giving of same gratuitously to the surface owner.

(2) The risk of erroneous deprivation by failing to file a statement of interest is great. The cost of requiring notice of threatened extinguishment to the mineral interest holder before extinguishment and an opportunity to file the statement of interest is clearly insignificant in view of the risk of the erroneous deprivation of the rights of the mineral interest holders.

(3) Finally the government plays no part in the extinguishment except for the passage of the Act.

> No additional administrative burdens of consequence would be placed on government if the due process requirements were satisfied.

Thus, applying the three factors of *Matthews*, id., shows the need for due process, notice and hearing.

This Court in the 1979 decision of *Mackey* v. *Montryn*, 443 U. S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979), relied on the three factors set forth in *Matthews* v. *Eldridge*, *supra*, to determine that the Massachusetts statute mandating suspension of driver's license for refusing to submit to breath analysis was valid. In a 5-4 decision the Court held due process was not violated. In so doing it balanced the public and private interests pointing out that the public interest is substantially served by the summary suspension of license. It is submitted that no such public interest is present here to justify an extinguishment of right without notice or hearing.

The Act does not require anyone to "use" his mineral interests. All it requires is that one either "use" or rerecord. The only purpose served by the rerecording is that the owner be locatable so if someone wants to "use", i.e. develop the minerals, such person can find the true owner by looking in the book. The statute provides no guarantee that development will result. Even with the extinguishment and the gift to the surface owner there are no assurances of development. Thus, the only effect of the Act is to determine the whereabouts of the persons who own the mineral interests and place same of record. That being so, the purpose of the Act is satisfied if the true owner of the minerals is notified and given an opportunity to protect his interest by filing his statement of claim. If he then fails to respond due process has been

satisfied and a forfeiture may ensue, thus satisfying the objective of the Act, i.e. to have the whereabouts of the interest holder known, since at that time the mineral interest owner would be the surface owner.

It is submitted that the taking here is automatic, complete and absolute without any requirement of notice of any kind, thus violating the rules as laid down in *Sniadach* v. *Family Finance Corporation of Bayview*, 395 U. S. 337, 89A S. Ct. 1820, 23 L. Ed. 2d 349 (1969).

The effect of the Act is to take the mineral owner's property because he did not use it for 20 years and did not rerecord his interest within the 20 year period. No notice was given of the lack of rerecording before the forfeiture occurred. At the very least such notice should be required before the application of the draconian remedy of extinguishment.

Appellee has argued that everyone is presumed to know the law and therefore the mineral interest holders are presumed to know of the 20 year requirement of use and of the two year grace period for filing a statement of claim, thus the notice requirement of due process is satisfied. In Indiana there is no "publication" of the statutes adopted except by the yearly printing and distribution of the Acts for each legislative session to the various county clerks. Indiana Code 2-6-1.5-5. Suffice it to say that if this Court would not approve the notice by publication in a newspaper in *Mullane, supra,* because it was "not reasonably calculated to reach those who could easily be informed by other means at hand" such notice of the adoption of the Act would not satisfy the due process requirement.

The Act violates the 14th Amendment in that it extinguishes a substantial property right, i.e. a fee simple title, without notice or opportunity for hearing.

C. Just Compensation. The Act Violates Section 1 of the 14th Amendment By the Taking of Private Property From One Property Owner and Giving to Another Property Owner Without Any Compensation.

Section 1 of The Act provides:

> "Any interest in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished unless a statement of claim is filed in accordance with section five hereof, and the ownership shall revert to the then owner of the interest out of which it was carved."

The Act was adopted in 1971. Appellants acquired their interests many years prior to the Act. The Act further provided, in Section 3, that where the 20 year period had expired at the time of the adoption of the Act, that a statement of claim had to be filed within two years of the effective date of the Act.

The net effect of the Act was to take unused oil, gas and coal properties from the owners of such mineral interests and give them to the owners of the surface. Such taking and giving was accomplished without notice and without compensation in any form.

It is not sufficient to say that Appellants could have protected themselves by filing a statement of claim within the two year period—admittedly a simple act—because no notice was given to them as to what was expected of them. The Act similarly provides no opportunity for the mineral interest owners to appear in any forum to declare and protect their interests or to show that, had they known of the filing requirements, they would have met them.

The Indiana Supreme Court in its opinion upholding the Act stated what it believes to be its purpose. The Court said:

> "The Act reflects the legislative belief that the existence of a mineral interest about which there has been no display of activity or interest by the owners thereof for a period of twenty years or more is mischievous and contrary to the economic interests and welfare of the public. The existence of such stale and abandoned interests creates uncertainties in titles and constitutes an impediment to the development of the mineral interests that may be present and to the development of the surface rights as well. The Act removes this impediment by returning the severed mineral estate to the surface rights owner. There is a decided public interest to be served when this occurs. The extinguishment of such an interest makes the entire productive potential of the property again available for human use."

Thus, it is clear the purpose of the Act is not to find and put on record the names and addresses of mineral interests holders but to *extinguish* all mineral interests not used within the 20 year period. This is not regulation but extinction! This is not fine and imprisonment for non-use but capital punishment. Knowing the objective to *extinguish* the property right it is perfectly understandable why there was no notice and opportunity for hearing provided in the Act. Such notice would have interfered with the State's purpose to reunite mineral rights with surface rights.

Indiana has a right to make its own public policy so long as consistent with the United States Constitution. This Court does not sit as a superlegislative body to weigh

the wisdom of legislation nor to decide whether the policy which it expressed offends the public welfare so long as specific constitutional prohibitions are not violated. *Sniadach* v. *Family Finance Corp. of Bayview, supra; Day-Brite Lighting* v. *State of Missouri,* 342 U. S. 421, 72 S. Ct. 405 (1952).

Assuming for the moment a valid public purpose would be served, does that make valid a taking from one property owner and a giving to another? It should be noted that every condemnation proceeding must have a valid public purpose as a prerequisite to a taking with compensation. See *Pennsylvania Coal Company* v. *Mahon, Pennsylvania Coal Company* v. *Mahon,* 260 U. S. 393, 415, 43 S. Ct. 158, 159, 67 L. Ed. 322 (1922) where it is said:

> "The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the 14th Amendment."

Having a valid public purpose is therefore only the start of this inquiry, since the means to achieve such public purpose must be tested against the constitutional requirements.

We are not dealing here with the regulation of property or the *taking of* "one strand" from the "full bundle of property rights" as in *Andrus* v. *Allard,* 444 U. S. 51, 61, 100 S. Ct. 318, 327 (1979). Here we are dealing with a taking of the "full bundle of property rights," with Appellants left with nothing. The taking has been clean, painless, antiseptic. Property rights are "extinguished" without the bother or trouble of notice, of courts or of hearings, or of having to pay from the public treasury for the taking

of such property rights. That may be the way some countries run their business, but so long as we have a Constitution, it is not our way.

In *Kaiser Aetna* v. *United States*, 444 U. S. 164, 100 S. Ct. 383 (1979), the United States attempted to allow public access onto private property on the theory that such private property had become navigable waters as a result of the actions of the property owners. There, the Court distinguished between mere regulation (as in *Andrus* v. *Allard, supra*) and an actual taking (as in *United States, ex rel TVA* v. *Powelson*, 319 U. S. 266, 63 S. Ct. 1047, 87 L. Ed. 1390 [1943]). In *Kaiser Aetna, supra*, this Court speaking through Mr. Justice Rehnquist, held that giving public access to private lands was a "taking" which could not be effectuated without just compensation.

The case of *Pennsylvania Coal Company* v. *Mahon, supra*, (cited by this Court in *Penn Central Transportation Company* v. *New York City*, 438 U. S. 104, 98A S. Ct. 2646, 57 L. Ed. 2d 631 [1978] as the "leading case" in this area) is relevant to the issue of "taking." There a Pennsylvania statute prohibited the mining by a mineral owner under property of a surface owner, if such mining would cause a subsidence of the surface. In the opinion of the Court, written by Mr. Justice Holmes, it was stated that the statute admittedly destroyed existing rights of property and contract. The question is whether the police power can be stretched to permit such destruction of right. The Court said:

> "One fact for consideration in determining such limits [of police power] is the extent of the diminution. When it reaches a certain magnitude, in most if

not in all cases there must be an exercise of eminent domain and compensation to sustain the act. . . . ." *Pennsylvania Coal Company* v. *Mahon, supra,* 260 U. S. at page 413

". . . the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate,—. . . ." *Pennsylvania Coal Company* v. *Mahon, supra,* 260 U. S. at page 414

"We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought." *Pennsylvania Coal Company* v. *Mahon, supra,* 260 U. S. at page 416

Here the effect of the Indiana Act is to take the entire fee simple title to the mineral rights and give them to the surface owner, thus giving to the surface owner "greater rights than they bought." As was held in *Mahon, supra*: there may be a valid public purpose even one sufficient to invoke the power of eminent domain, but the state cannot take the property right without just compensation.

In *Penn Central Transportation Company* v. *City of New York, supra,* the Court rejected claims of the property owners and determined there had not been a "taking" under the New York historic landmark preservation law. The Court noted that whether a particular government restriction amounts to a taking depends largely upon the particular circumstances in each case. One of the factors hav-

ing particular significance, the Court noted was "The economic impact of the regulation on the claimant and particularly, the extent to which the regulation has interfered with distinct investment backed expectations."

Here, the Indiana Act destroys a property right created solely for the pursuit of "investment backed expectations."

The second factor in the *Penn Central* case is whether the regulation interfered with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for 5th Amendment purposes. Here the State of Indiana has determined as a matter of state law, that Appellant mineral interest owners had a "property interest" entitled to constitutional protection. *Short* v. *Texaco, supra.* By the extinguishment of such property interests there was a complete and absolute "interference" as referred to in the *Penn Central* case.[1]

The conclusion from *Pennsylvania Coal, Kaiser Aetna, Penn Central, Anderson* and others that condemn regulations that rise to the level of a taking apply a fortiori here. In the regulation cases the owner is still left with title, albeit restrictions on use. In this case, title and the full bundle of rights constituting ownership were taken and extinguished.

It should be noted that in the normal "taking" case the beneficiary was the public acting through government. Here there was a public taking of a private property interest and the giving of the benefits of such "taking" to a private party, i.e. the surface owner. Such action makes it

[1]The Indiana decision presents a complete dichotomy. On the one hand it recognizes that mineral interests are property rights, "entitled to the firmest protection of the Constitution." On the other it permits its extinction without notice and without just compensation.

no less a taking. (See *Pennsylvania Coal Co.* v. *Mahon, supra*). If anything it would appear to exacerbate the taking.

Appellee has attempted to justify the Indiana Act on the basis that it is "analogous to acts of limitation which vests title to real and personal property." It is submitted there is no analogy. Statutes of Limitation are devices to protect the integrity of the judicial process by excising stale claims. The policy of the law is to require a claim to be timely pursued before evidence has disappeared and memories faded. *Chase Securities Corporation* v. *Donaldson*, 325 U. S. 304, 65 S. Ct. 1137, 89 L. Ed. 1628 (1945). The Court in *Chase* went on to say that though the 14th Amendment does not make an act void merely because it has some retroactive application "what it does forbid is taking of life, liberty or property without due process of law."

There is a fundamental difference between statutes of limitation and the Indiana Act. Statutes of limitation deal with stale claims and interpose a procedural bar to asserting such claim in court. The Indiana Act, however, is substantive. It does not purport to deal with claims but extinguishes property ownership in one and vests it in another. There is no analogy with statutes of limitation.

It is to be noted that Section 8 of the Act provides there can be no waiver of the use requirements. Such a provision is inconsistent with the Act being in the nature of a statute of limitations since waiver is a defense to limitation statutes. *Allen* v. *Smith*, 129 U. S. 465, 9 S. Ct. 338, 32 L. Ed. 732, 51 Am. Jur. 2d 894 (Limitation of Actions §422).

The Indiana Act is not similar to the Marketable Title Acts or other title recordation statutes. Marketable Title

Acts and recordation acts are designed to deal with conflicting claims of title to the same property. Here we are not dealing with the same property. Indiana Code 32-5-7-3 (see page 15 above) vests a mineral interest with the same standing or dignity as the surface interest. Each can be fee simple title. Each is independent of the other. Neither is appurtenant to the other. Thus, these are titles in tandem not titles in collision, such as is dealt with in the Marketable Title Acts.

Marketable Title Acts provide that if one has clear record title for a long period of time any claims or interests which are inconsistent therewith arising prior to the stated period are extinguished unless such claim is recorded. Thus, the legislation removes ancient or purely technical impediments to title in favor of a clear record title holder which is essentially a sorting out of competing claims. Here there are no competing claims, except as the legislature has created same.

The Supreme Court of Minnesota in *Contos* v. *Herbst*, ____ Minn. ____, 278 N. W. 2d 732 (1979), dealing with a statute similar to the Indiana Act which it held unconstitutional discussed both the Marketable Titles Act and the statute of limitations analogy. In both instances it held such acts were not analogous. See also the opinion of the Illinois Supreme Court in *Wilson* v. *Bishop*, 82 Ill. 2d 364, 412 N. E. 2d 522 (1980) Both such cases are set out in full as Appendix H and I to the Jurisdictional Statement.

There is no analogy to the Marketable Title Acts or the Recording Acts.

D. Equal Protection. The Indiana Act Violates the Equal Protection Clause of the 14th Amendment By Giving Special Privileges to Mineral Interest Owners Having 10 or More Mineral Interests Not Granted to Lesser Interests, Thus Treating Persons of the Same Class Differently.

Section 5 of the Act provides that failure to file a statement of claim shall not cause a mineral interest to be extinguished if the owner of 10 or more interests failed to do so by inadvertence after having filed a statement of claim as to other mineral interests. As to such multi-interest holders, their claim shall be extinguished only if they fail to file their statement of claim within 60 days after having been notified by publication and by mail of the fact that their mineral interest had lapsed.

The net effect of Section 5 of the Act is to afford multi-interest holders a form of procedural due process not afforded to those having lesser interests.

It is submitted that the Act makes an "invidious discrimination" and an "arbitrary classification." The Act treats persons of the same class differently in violation of the equal protection clause. *Ohio* v. *Dollison,* 194 U. S. 447, 48 L. Ed. 1062 (1904).

Procedural due process is a right afforded to all under the Constitution. Presumably those with the greater number of interests would be more sophisticated and more knowledgeable, yet they are given the privilege of inadvertence and requirement that they be personally notified before their lapsed rights can be extinguished.

Since the issue is not in the area of "suspect classifications" but in the economic area, we realize the level of scrutiny is low. *U. S. Railroad Retirement Board* v. *Fritz,*

___ U. S. ___, 101 S. Ct. 453, 459; 66 L. Ed. 2d 368 (1980). This case is different, however, in that the Act grants the constitutional protection of procedural due process to a certain class (10 and over) and withholds such protection from all other folks. Such invidious discrimination on an important constitutional right is one not to be tolerated.

If the purpose of the Act is to identify on the record the current owners of the mineral interests then the purpose of the Act is best served by giving prior notice to all mineral owners along with the opportunity to protect their rights by filing the statement of claim.

The invidious discrimination is of a fundamental constitutional right.

E. Impairment of Contract. The Act Violates the Contract Clause By Extinguishing a Contract Right Without the Consent or Action of the Parties.

The rights of Appellant mineral owners arise out of a deed of conveyance from the owner of the fee. Such mineral rights arise out of contract. Under the Act the rights granted by such mineral deed are not only impaired, they are extinguished by reason of state action. Therefore, the Act violates the Contract Clause of Article 1, Section 10 of the U. S. Constitution.

The two most recent cases of this Court upholding the Contract Clause are:

United States Trust Company of New York v. *New Jersey*, 431 U. S. 1, 97A S. Ct. 1505, 52 L. Ed. 2d 92 (1977) and *Allied Structural Steel Company* v. *Spannaus*, 438 U.S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978).

In the *U. S. Trust Company* case, *supra*, the Court held unconstitutional a retroactive repeal of a 1962 covenant

dealing with subsidizing of rail passenger transportation. Such repeal impaired the rights of bond holders who relied on the covenant as part of their security.

In *Spannaus, supra,* the Court held a Minnesota statute requiring an employer under existing employee pension plans to pay a pension funding charge if the pension plan was thereafter terminated or the employer closed a Minnesota office. In opinions by Mr. Justice Blackman and Mr. Justice Powell, respectively, the police power of the states was recognized in the area of contract impairment. In the *U. S. Trust* case, *supra,* the Court said:

> "Similarly, a state is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." 431 U. S. at page 31, 97 S. Ct. at page 1552.

Here, if the State had required notice to be given to the mineral interest holder prior to the forfeiture with an opportunity to file a statement of claim within a reasonable time after such notice, such requirement would have been the more moderate course and would have served the state's purpose of making the mineral interest owners known equally well.

In the *Spannaus* case, *supra,* the Court said:

> "If the Contract Clause is to retain any meaning at all, however, it must be understood to impose some limits upon the power of a State to abridge existing contractural relationships, even in the exercise of its otherwise legitimate police power."
>
> "In applying these principles to the present case, the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractural relationship. The severity of the impair-

ment measures the height of the hurdle the state legislation must clear." *Allied Structural Steel Company* v. *Spannaus*, 438 U. S. at page 242, 92A S. Ct. at page 2721.

Again the Court talked about the expectations of the parties in their contract dealings and whether the state action frustrated such expectations. Here the Appellants had fee simple title to the minerals—the greatest bundle of rights one could have in property. A fee simple title is not a terminable interest or one limited by time. The Act essentially changed the nature of the property interest to one limited in time and with burdens imposed that were not part of the original contract of conveyance. Further, the net effect of the Act was to forfeit the contract rights. When judged by the severity of impairment in the case—the State cannot clear the hurdle.

The Supreme Court of Nebraska in *Wheelock* v. *Heath*, 201 Neb. 835, 272 N. W. 2d 768 (1978), held a Nebraska statute similar to the Indiana Act unconstitutional under both the Due Process and Contract Clauses of the U.S. Constitution.

CONCLUSION

To the extent that Indiana attempted by the Act to extinguish old, abandoned and forgotten mineral interests and to restore such ownership to the owner of the surface, it probably served a valid public purpose. Unfortunately, the Act was cast in a form much broader than that for it applied equally to the known mineral owner who may have very valid reasons for not using such minerals within the 20 year period. Further, the Act had a retroactive effect. For those who did not use their mineral interests in the

20 year period preceding the Act, they were granted a grace period of only two years.

In every case cited in this brief the extent of the harm inflicted by the state statutes on private interests was less than the harm imposed here. Here there was no impairment of rights but a complete extinguishment. Here there was no notice of any kind before the taking.

Had the legislation provided notice to all mineral interest holders with the opportunity to file a statement of claim after notice in the form and manner set forth in Section 5 of the Act, the requirements of procedural due process would probably have been satisfied. It would have eliminated the equal protection issue and could be justified as a reasonable regulation affecting contracts. Any person not responding to the notice by filing a statement of claim would be deemed to have abandoned the property interest. At that point the doctrine of escheat could apply, vesting title in the state or possibly a theory of abandonment which would justify vesting title to the abandoned property in the surface owner.

Another method of attacking the problem is to impose an ad valorum tax on the mineral interest and if the tax is not paid the interest could be sold at tax sale.

The point is that there are constitutional ways to achieve the result of cleaning up old abandoned mineral interests. The Indiana Act fails four constitutional tests in the manner in which it tried to attack the problem.

The Act should be held unconstitutional as violating the 14th Amendment and Article 1, Section 10 of the U.S. Constitution and the decision of the Supreme Court of Indiana should be reversed.

Respectfully submitted,

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